MOTION FILED
NOV 7 - 1986

No. 86-546 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* IN OPPOSITION TO THE PETITION

WILLIAM PAUL RODGERS, JR.*
General Counsel

CHARLES D. GRAY
Assistant General Counsel

National Association of
Regulatory Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 898-2200

Counsel for Amicus Curiae

November 7, 1986
(**Counsel of Record*)

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

131P

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-546

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court, the National Association of Regulatory Utility Commissioners ("NARUC") respectfully moves for leave to file the attached brief as *amicus curiae*.[1]

---

[1] NARUC has obtained consent to file this brief from respondents, The City of New Orleans, *et al.* The letter granting such consent has been filed with the Clerk of the Court. The petitioner, New Orleans Public Service Inc., has consented orally to NARUC's participation, but no written confirmation has been received.

SPECIAL INTEREST OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The City of New Orleans, respondent herein, through its regulation of utilities, is a member of the NARUC, as are the regulatory commissions of Arkansas, Louisiana, and Mississippi, which regulate utilities affiliated with New Orleans Public Service Inc., petitioner herein. These commissions support the NARUC's filing of its brief.

Most of the public utilities subject to regulation by NARUC's members also are subject to regulation at the federal level with respect to services provided or transactions undertaken in interstate commerce. Although regulation by federal agencies and regulation at the State level by NARUC's members generally are compatible, in recent years an increasing number of disputes have arisen as to whether State regulation, to some extent, has been preempted by federal law or by the actions of a federal agency. In such instances, NARUC has a continuing interest in ensuring that overbroad interpretations of the scope of federal jurisdiction do not impinge upon or frustrate the ability of NARUC's members to discharge obligations entrusted to them under State laws.

In this case, the Fifth Circuit affirmed the decision of the district court to abstain from deciding a claim of federal preemption, where the local regulator had

not yet issued a final decision and adequate State court remedies existed. In other recent cases, some courts have decided to abstain, and others have decided not to abstain, when confronted with a claim of federal preemption. The petitioner in this case asserts that there exists a conflict among the circuit courts on the question whether to abstain in the face of a preemption claim. The petitioner evidently seeks a ruling from this Court that abstention by a federal court never (or rarely) is proper when the utility has asserted a claim of federal preemption.

NARUC has a strong interest in preserving the doctrine of federal abstention and believes that the circuit courts can address the abstention issue in the context of alleged preemption without further guidance from this Court. As the association of State utility regulators throughout the country, NARUC believes that it can assist in articulating the reasons why the issue raised by the petition does not require Supreme Court review.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the attached brief, NARUC respectfully requests that the Court grant its motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

WILLIAM PAUL RODGERS, JR.*
General Counsel
CHARLES D. GRAY
Assistant General Counsel
National Association of
Regulatory Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 898-2200

(**Counsel of Record*) Counsel for *Amicus Curiae*

November 7, 1986

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS	1
STATEMENT OF THE CASE	3
REASONS WHY THE COURT SHOULD DENY THE PETITION	3
CONCLUSION	6

TABLE OF AUTHORITIES

CASES: Page

Nantahala Power and Light Co. v. Thornburg, 106 S.Ct. 2349 (1986) 4

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 106 S.Ct. 2718 (1986) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-546

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS *AMICUS CURIAE* IN OPPOSITION TO THE PETITION

INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in

the regulation of utilities and carriers. The City of New Orleans, respondent herein, is a member of the NARUC, as are the regulatory commissions of Arkansas, Louisiana, and Mississippi, which regulate utilities affiliated with New Orleans Public Service Inc., the petitioner herein. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating electric utility companies within their respective borders. As such, these officials have the obligation to assure the establishment of such electric utility services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. The State regulatory commissions are the creatures of their respective legislatures, established to regulate utilities exercising monopoly powers within their service territories.

As explained in its accompanying motion, the NARUC's status as the national representative of State and local regulatory bodies gives the Association a strong interest in preserving the doctrine of federal abstention. Wholesale abandonment or restriction of that doctrine in the context of retail electric regulation would greatly frustrate and impede the ability of NARUC members to properly discharge their responsibility under law to regulate utilities in the public interest. Utility regulation is a delicate, complex process through which regulators exercise their expert judgment to balance the interests of utilities and ratepayers. A decision by this Court which restricts the

abstention doctrine, thereby thrusting the federal judiciary into essential local regulatory matters, would greatly and adversely affect the ability of all NARUC members to regulate in a reasoned, careful, and judicious manner. Therefore, the NARUC's strong interest in this case is apparent.

STATEMENT OF THE CASE

NARUC adopts the Statement of the Case provided by respondents The City of New Orleans, *et al.*

REASONS WHY THE COURT SHOULD DENY THE PETITION

NARUC will not burden the Court with an extensive discussion of the facts of this case or analysis of the other cases in which the federal courts have determined whether to abstain in the presence of a federal preemption claim. Respondents have set forth the facts of this case in detail and have ably addressed the issues of mootness, ripeness, exhaustion of administrative remedies and abstention, as well as the underlying issue of preemption in the context of the Federal Power Act. Moreover, a lengthy *amicus* brief in opposition to the petition might give credence to the suggestion by petitioner and other *amicus* parties that this case presents an issue the Court should decide. NARUC's sole purpose here is to make clear that the position of respondents—that the petition should be denied—reflects a view shared by State regulatory bodies throughout the country.

Recent experience in the electric utility industry underscores the vital role played by State utility regulators in striking a proper balance between the sometimes conflicting objectives of fostering sound

conditions in the industry and protecting the interests of ratepayers. A request by an electric utility for retail rate relief sufficient to cover expenses associated with a high-cost nuclear plant may raise a number of significant issues that local regulators are well-equipped to address. Such issues include the prudence of the utility in incurring the involved expenses, the appropriateness of "phasing in" the requested increase in order to mitigate the adverse "rate shock" effect on the local community, and the need for a rate design that equitably allocates the increase among different classes of retail ratepayers. The extent, if any, to which such functions are preempted by federal law, or by specific actions of the Federal Energy Regulatory Commission ("FERC"), can only be determined through careful adherence to the "bright line" between federal and State jurisdiction drawn by the Federal Power Act and through careful consideration of the specific actions taken by the FERC and by the State regulator in a particular case. Such determinations also must, of course, be guided by this Court's recent decision in *Nantahala Power and Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986).

The State courts, no less than the federal courts, are competent to make such determinations. Moreover, a claim of federal preemption can better be addressed when the State regulator has had an opportunity to render a decision on the merits. The doctrine of federal abstention is based on notions of comity and federalism, and ensures that the States remain free to address issues of significant local concern without interference by the federal courts.

The federal courts appear, on the whole, to be following a rational approach in determining whether to

abstain in the presence of a federal preemption claim. While a particular State regulator or utility may disagree with the result reached in a particular case, the pattern that has emerged indicates that the federal courts will look closely at the facts of each case and the precise nature of the preemption claim asserted before determining whether to abstain. Some courts have decided to abstain and some have not, but no court has adopted a rigid rule either mandating or barring abstention in the face of a preemption claim. In these circumstances, further guidance from this Court is not necessary. This is particularly true in light of the guidance on abstention recently provided by the Court in *Ohio Civil Rights Comm'n. v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

WILLIAM PAUL RODGERS, JR.*
General Counsel
CHARLES D. GRAY
Assistant General Counsel
National Association of
Regulatory Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
November 7, 1986 (202) 898-2200

(**Counsel of Record*) Counsel for *Amicus Curiae*